Rule 8, Ariz. R. Crim. P.

SPEEDY TRIAL – Speedy trial issues and pre-indictment delay issues distinguished – Revised 10/2009

A defendant's right to a speedy trial does not attach until the defendant is held to answer for the charge as held in *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997):

> A person's Sixth Amendment right to a speedy trial does not attach until an indictment has been returned or a complaint has been filed and a magistrate has found that probable cause exists to hold the person to answer before the superior court. This is well established law in Arizona.

Thus, Rule 8, Ariz. R. Crim. P., does not apply to pre-indictment delay issues. *State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (App. 1997).

Any delay in bringing charges against a defendant is analyzed as a due process issue rather than a speedy trial issue. *State v. Saiz*, 103 Ariz. 567, 570, 447 P.2d 541, 544 (1968). Still, pre-indictment delay rarely implicates due process:

> The due process clause plays only a limited role in evaluating pre-indictment delay. *U.S. v. Lovasco*, 431 U.S. 783, 789 (1977). The primary guarantee against a stale prosecution is the statute of limitations. *State v. Van Arsdale*, 133 Ariz. 579, 653 P.2d 36 (App.1982).

State v. Broughton, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988).

In *State v. Medina*, 190 Ariz. 418, 421-22, 949 P.2d 507, 510-11 (App. 1997), and *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (App. 1997), the Court of Appeals held that for pre-indictment delay to justify dismissing a case, the defendant must show both intentional delay on the part of the State,

and actual and substantial prejudice resulting from that delay. The Court of Appeals stated in both *Lemming* and *Medina*:

> Arizona courts have interpreted *U.S. v. Lovasco*, 431 U.S. 783, 789 (1977) and *U.S. v. Marion*, 404 U.S. 307 (1971) to require that a defendant show intentional delay by the prosecution to obtain a tactical advantage, and actual and substantial prejudice as a result of the delay. *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996) ("Moreover, even in cases where an accused experiences some prejudice from a lapse of time, prosecutions following investigative delays do not necessarily offend due process."); State v. Williams, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995); State v. Broughton, 156 Ariz. 394, 397-98, 752 P.2d 483, 486-87 (1988).

The defendant must show more than investigative delay to prove intentional delay by the prosecution as a means of obtaining a tactical advantage. *U. S. v. Lovasco*, 431 U.S. 783, 789 (1977) (citing *U.S. v. Marion*, 404 U.S. 307 (1971)). "In *Lovasco*, the Supreme Court distinguished intentional tactical delay from investigative delay, and held that investigative delay does not violate due process, even if a defendant's 'defense might have been somewhat prejudiced by the lapse of time.' 431 U.S. at 795-96." *State v. Medina*, 190 Ariz. 418, 949 P.2d 507 (App. 1997).

For a defendant to show that he suffered "actual and substantial prejudice" from pre-indictment delay, the defendant must show that his ability to meaningfully defend himself was actually impaired. *U.S. v. Cederquist*, 641 F.2d 1347, 1351 (9th Cir.1981). In *State v. Torres*, 116 Ariz. 377, 379, 569 P.2d 807 (1977), the Arizona Supreme Court said that the unavailability of a witness, without more, is not enough to establish prejudice.

> To establish actual impairment, a defendant must show that a defense witness became unavailable during the delay, that such witness would have testified on the defendant's behalf, the substance of the testimony,

> and that such testimony is not available through substitute sources. *U.S. v. Bartlett*, 794 F.2d 1285, 1289-90 (8th Cir.1986); [*U.S. v.*] *Cederquist*, [641 F.2d 1347, 1351 (9th Cir.1981)] (ability to meaningfully defend not actually impaired because defendant's briefs reveal that substitutes for lost evidence exist). The detail provided by the defendant must be sufficient for a court to determine whether the missing witness is material to the defense. *Bartlett*, 794 F.2d at 1290.

State v. Lemming, 188 Ariz. 459, 462-63, 937 P.2d 381, 384-85 (App. 1997).

In *State v. Medina*, 190 Ariz. 418, 949 P.2d 507, 511 (App. 1997), a DUI case, the defendant claimed that his defense was prejudiced because in the time between his original arrest and the time he was held to answer on the charges in the case, one of the other people who was in the car with him had moved out of state and could not be located. Medina asserted that, had this witness been available, she would have testified that Medina was not driving the car when he was cited for driving drunk. The Court of Appeals found that Medina could not show prejudice because a third person who was also in the car was available to testify as to Medina's claim that he was not driving. Therefore, the Court of Appeals found that, while Medina might have suffered some prejudice, he had not shown "actual and substantial prejudice" and so was not entitled to relief. *Id*. at 421, 949 P.2d at 510.